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Supreme Court, U.S.
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No. 93-1966

In the Supreme Court of the United States

OCTOBER TERM, 1994

THEVARATHANTHRIGAE NIHAL GUNAWANSA, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Board of Immigration Appeals properly concluded, in light of petitioner's conviction for conspiracy to possess heroin with intent to distribute it, that petitioner was ineligible for withholding of deportation under 8 U.S.C. 1253(h)(2)(B), because he had been convicted of a "particularly serious crime" and was therefore a "danger to the community of the United States."

2. Whether the Board of Immigration Appeals properly concluded that petitioner was not eligible to receive asylum because he had not shown a well-founded fear of persecution if he were returned to Sri Lanka.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4a-10a) is unpublished, but the judgment is noted at 21 F.3d 422 (Table). The opinion of the Board of Immigration Appeals (Pet. App. 12a-20a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 11, 1994. A petition for rehearing was denied on April 5, 1994. Pet. App. 3a. The petition for a writ of certiorari was filed on June 8, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a citizen of Sri Lanka, was admitted to the United States in February, 1985, as a non-immigrant crewman. He was authorized to remain in this country while his ship was in port, but on no account for longer than 29 days. When his ship departed that same month, he remained in the United States. Gov't C.A. Br. 3. Two years later, he was convicted in the United States District Court for the Eastern District of Louisiana of conspiring to possess heroin with intent to distribute it, in violation of 21 U.S.C. 841(a) and 846, and was sentenced to a five-year term of imprisonment. *Ibid.* The Immigration and Naturalization Service (INS) commenced deportation proceedings against petitioner, based on his overstay and his drug convictions. *Ibid.*

On April 7, 1986, petitioner filed an application for asylum, which was automatically deemed to be an application for withholding of deportation as well. Gov't C.A. Br. 4; see 8 C.F.R. 208.3(b).[1] In support of his application, petitioner claimed that he was a member of the Sinhalese majority ethnic group in Sri Lanka, that he had spoken out against the Tamil minority ethnic group

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[1] Withholding of deportation extends the right to remain in the United States to an alien demonstrating a "clear probability of persecution" in his or her native country. See *INS* v. *Stevic*, 467 U.S. 407, 413 (1984); 8 U.S.C. 1253(h) (1988 & Supp. IV 1992). An alien is eligible for asylum, and may be granted asylum as a matter of administrative discretion, if he or she demonstrates a "well-founded fear" of persecution. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 427-428 (1987); 8 U.S.C. 1158. The "well-founded fear of persecution" standard for asylum is less rigorous than the "clear probability" standard applicable to requests for withholding of deportation. See 480 U.S. at 432-433. For this reason, the Board of Immigration Appeals always deems an alien's request for asylum to include a request for withholding of deportation.

in that country and had distributed anti-Tamil literature, that persons looking like Tamils had visited his home in Sri Lanka and had asked his family to see him, and that he had decided to come to the United States because he "was afraid of staying longer in Europe. There were too many Tamils there." See Gov't C.A. Br. 4. He described acts of violence by Tamils against Sinhalese, reprisals by the Sinhalese, and violent counterattacks by Tamil forces against Sinhalese businesses, including his father's business. See Pet. App. 13a-14a.

An advisory letter from the State Department's Bureau of Human Rights and Humanitarian Affairs, dated November 6, 1990, opposed petitioner's application for asylum. The State Department stated that petitioner is "a Sinhalese Buddhist, which constitutes the majority of the Sri Lankan population. His purported fear of Tamil militants * * * is simply not credible." Gov't C.A. Br. 5.

The immigration judge found petitioner ineligible to receive asylum. It characterized petitioner's evidence as consisting of "mostly self-serving statements * * * that are totally unsupported by any evidence in the record. * * * There's no showing that Tamils have any personal interest in [petitioner]. * * * There's no showing that the father's loss of property had anything to do with the activity of [petitioner]." Gov't C.A. Br. 8. The immigration judge also denied asylum as a matter of discretion, based on petitioner's drug conviction, and noted that, had petitioner filed his application for asylum after October, 1990, he would have been ineligible by statute for asylum because of that conviction. See *id.* at 9.

2. The Board of Immigration Appeals (Board) dismissed petitioner's appeal, concluding that petitioner

was ineligible for either asylum or withholding of deportation. Pet. App. 12a-20a. The Board noted that petitioner was a member of the majority ethnic group in Sri Lanka, and that he had never been detained, interrogated, convicted, sentenced, or mistreated by authorities there. *Id.* at 13a. The Board characterized petitioner's fear of harm by militant Tamils as "speculative," *ibid.*, noting the lack of evidence that Tamil militants were aware of petitioner's anti-Tamil activities, or that the destruction of his father's business was due to those activities, *id.* at 14a. The Board also rejected petitioner's claim of fear of harm from a militant Sinhalese group in reprisal for his cooperation with American authorities, describing that group's interest in petitioner as "strictly personal," rather than based on his race, religion, nationality, or political opinion. *Id.* at 15a. Thus, the Board concluded, petitioner had shown neither a well-founded fear of persecution nor a clear probability of persecution if he were returned to Sri Lanka. See *ibid.*

In addition, the Board concluded (Pet. App. 16a) that, because of his criminal conviction, petitioner was ineligible for withholding of deportation pursuant to 8 U.S.C. 1253(h)(2)(B). Section 1253(h)(2)(B) provides that an alien is not eligible for withholding of deportation if the Attorney General determines that "the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States[.]" The Board concluded that "[a]n alien convicted of trafficking in drugs has been convicted of a particularly serious crime,

representing criminal behavior which constitutes a danger to the community." Pet. App. 16a.[2]

3. The court of appeals affirmed the Board's deportation order in an unpublished opinion. Pet. App. 4a-10a. The court first found substantial evidence in the record as a whole to support the Board's decision to deny petitioner asylum. *Id.* at 7a. In particular, the court upheld the Board's determination that petitioner had not established that Tamil militants knew of his anti-Tamil activities, or that the militants had actually threatened or harmed him in any way. *Ibid.* The court also agreed with the Board that any threats of reprisal from Sinhalese militants against petitioner because of his cooperation with American authorities could not be described as threats of harm based on his race, religion, nationality, membership in a particular social group, or

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[2] In the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, Congress amended the Immigration and Nationality Act to define the term "particularly serious crime" to include any "aggravated felony" (see § 515(a)(2), 104 Stat. 5053), which in turn was defined to include "any illicit trafficking in any controlled substance (as defined in section 102 of the Controlled Substances Act)" (see § 501, 104 Stat. 5048). Heroin is defined as a controlled substance in the Controlled Substances Act. See 21 U.S.C. 802(6) and 812(c), Schedule I(b). Thus, if petitioner's application for withholding of deportation were governed by the 1990 Act, petitioner would be guilty of a "particularly serious crime" as a matter of statutory definition. However, the pertinent amendments in the 1990 Act apply only to applications for withholding of deportation mad on or after November 29, 1990, the date of enactment of the 1990 Act. See 104 Stat. 5088 (date of President's approval of 1990 Act); Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, § 306(a)(13)(2), 105 Stat. 1752. Petitioner's application was filed before November 29, 1990.

political opinion, and thus they were irrelevant to the asylum decision. See *ibid.*

The court also upheld the Board's conclusion that petitioner was ineligible for withholding of deportation. The court noted that, since petitioner had failed to present sufficient evidence to show that he had a well-founded fear of persecution, he also had failed, *a fortiori*, to meet the more stringent standard for withholding of deportation. Pet. App. 8a. In addition, the court affirmed the Board's determination that petitioner was ineligible for withholding of deportation because he was guilty of a "particularly serious crime," stating, "Since substantial evidence in the record as a whole supports the Board's order concerning denial of withholding of deportation on that basis, we affirm the Board's order in that regard." *Ibid.*

ARGUMENT

1. Petitioner argues (Pet. 4) that he "remains eligible for a grant of withholding [of deportation] under 8 U.S.C. 1253(h)." The apparent basis for this contention is the suggestion that the court of appeals erred in not requiring the Board of Immigration Appeals to find specifically that petitioner constituted a "danger to the community of the United States." In other words, petitioner argues that the Board should not have ruled that, because he had committed a "particularly serious crime," he was *ipso facto* "a danger to the community of the United States," and that the Board was required, in addition, to find in this particular case that petitioner was a danger to the community of the United States.[3]

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[3] In *In re Carballe*, 19 I. & N. Dec. 357, 360 (B.I.A. 1986), the Board rejected the argument that it must separately find that an alien who has been convicted of a particularly serious crime also constitutes a danger to the community of the United States.

For several reasons, this contention does not warrant this Court's review. First, it is far from clear that, in this case, the Fourth Circuit actually affirmed the Board's rule that an alien's conviction for a particularly serious crime also necessarily means that the alien presents a danger to the community of the United States. As petitioner points out (Pet. 4), the Fourth Circuit is expected to address this issue in *Kofa* v. *INS*, No. 92-1246, which was argued to the en banc court on March 8, 1994. The fact that the issue is still pending before the court of appeals suggests that the panel did not intend to decide the issue in its cursory discussion of petitioner's claim in its unpublished opinion in this case. The panel's opinion merely states that the Board's determination that petitioner constituted a danger to the community was supported by substantial evidence.

Second, even if we assume that the Fourth Circuit did decide the issue in this case, review would still be unwarranted because there is no conflict among the courts of appeals on the issue. The three other courts of appeals that have considered the matter have all upheld the Board's determinations that 8 U.S.C. 1253(h)(2)(B) disqualifies aliens convicted of "particularly serious crime[s]" from withholding of deportation because those aliens necessarily present a danger to the community, and that there is no need for a separate factual finding of dangerousness. See *Martins* v. *INS*, 972 F.2d 657, 661 (5th Cir. 1992); *Ramirez-Ramos* v. *INS*, 814 F.2d 1394 (9th Cir. 1987); *Crespo-Gomez* v. *Richard*, 780 F.2d 932 (11th Cir. 1986) (per curiam).

Third, the court of appeals' decision on this issue was an alternative ground for its ultimate conclusion that the Board had properly denied withholding of deportation to petitioner. The court of appeals independently upheld the Board's determination that petitioner was not

entitled to withholding because he had not shown a clear probability of persecution if he were returned to Sri Lanka. See Pet. App. 8a. Because, as we explain below, that finding by the Board was correct and is not worthy of further review, petitioner's challenge to the Board's interpretation of 8 U.S.C. 1253(h)(2)(B) will have no effect on his deportation.

2. Petitioner argues (Pet. 6-9) that he has a well-founded fear of persecution, and that the Board erred in ruling otherwise. This contention is fact-specific, and, in any event, the Board's ruling to the contrary was correct, as the court of appeals concluded. The court noted that petitioner is a member of the majority ethnic group in Sri Lanka, which controls the government in that country, that petitioner had never been mistreated by Sri Lankan authorities, that petitioner had failed to show that militants of the minority Tamil ethnic group knew of his participation in anti-Tamil activities, or had threatened or harmed him personally, and that petitioner's fears of reprisals from Sinhalese militants were not based on race, religion, nationality, social group membership, or political opinion. See Pet. App. 7a. In light of this record, the court of appeals did not err in concluding that substantial evidence supported the Board's conclusion that petitioner was not eligible for either asylum or withholding of deportation. See *ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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